No. 20931

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARMAND C. FEITCHMEIR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF OF APPELLANT ARMAND C. FEITCHMEIR.

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Statement of Pleadings and Facts Disclosing Jurisdiction.

The District Court had jurisdiction under 18 U.S.C. 3231, 62 Stat. 826, this being a proceeding on an indictment [CT 2][1] in four counts charging this Appellant with violations of section 7201, Internal Revenue Code of 1954 (willful attempt to evade or defeat income tax). In the four counts of the indictment, appellant is charged with violations of the latter statute for the taxable years 1958, 1959, 1960 and 1961, respectively.

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[1]The Record, pursuant to Rule 10(2) of this Court, is not printed. It consists of the Clerk's Transcript [denominated on the cover page thereof as Transcript of Record and herein referred to as CT . . .]; the major portion of the Reporter's Transcript [herein referred to as RT . . .], and certain designated original exhibits. In Volume II and III there is a duplication of page numbers in the Transcript of Record. In those cases where Volume II is being referred to specific mention will be made.

This is an appeal [CT 145] from a judgment sentencing Appellant to pay a fine in the sum of $7,500.00 on count two of the indictment and $7,500.00 on count four of the indictment, upon a verdict of the court, sitting without a jury finding Appellant not guilty on counts one and three of the indictment and guilty on counts two and four [CT 144]. Judgment was rendered and entered on January 10, 1966 [CT 144]. Notice of appeal was filed on January 17, 1966 [CT 145].

This court has jurisdiction of the appeal under 28 U.S.C. 1291, 1294(1) and the Rule 37(a), Federal Rules of Criminal Procedure.

Statutes and Constitutional Provisions Involved.

The applicable statutes and constitutional provisions are set forth in the Appendix, *infra.*

Statement of Case.

Armand C. Feichtmeir, the Appellant, during the years 1958, 1959, 1960 and 1961 was primarily engaged in the operation of a general insurance agency known as Armand C. Feichtmeir and Company, a corporation. The Appellant owned substantially all of the stock in the company. In addition, he was the principal shareholder in Pan American Underwriters, Inc. and Pan American Underwriters of Arizona, corporations which were engaged in servicing the group health and accident insurance contracts for agricultural labor in California and Arizona. He had various other investments which consisted of common and preferred stocks, municipal bonds and real estate including an apartment house.

The income reported and the tax paid for the years covered by the indictment are as follows [Ex. 128]:

Year	Income Reported	Tax Paid
1958	$50,472.53	$20,509.84
1959	38,522.15	13,661.86
1960	48,188.06	18,494.04
1961	64,126.25	28,612.25
Total	$201,308.99	$81,277.99

The Appellant was acquitted on counts one and three covering the years 1958 and 1960, respectively. Concerning the years 1959 and 1961 for which a guilty verdict was entered, the Government claims additional taxable income and tax liabilities thereon as follows:

Year	Additional Unreported Income	Additional Tax Liability
1959	$95,955.41	$66,195.76(RT 382)
1961	31,172.98	20,935.48(RT 382)

The case was prosecuted under the net worth theory of evidence.

The Appellant exercised his right under the Constitution and did not testify. (See *Slochower v. Board of Education of New York* (1955), 350 U.S. 551, excerpt of opinion set forth below.)[2]

There was no evidence that the Appellant was engaged in any concealed business or that his reported

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[2]*Slochower v. Board of Education of New York* (1955), 350 U.S. 551, 557, 558; 100 L. ed 692, 700.

The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important

(This footnote is continued on the next page)

businesses were capable of producing more income than was reported on his income tax returns.

Although the prosecution claimed evidence that the Appellant had a net worth in excess of half a million dollars at the close of 1961 and that he was a man engaged in numerous successful business ventures, their evidence of his liabilities indicates only that he had debts *not less than* $80.56 [Ex. 82; RT 106-107]. The record does not reveal any investigation by the government to determine whether there were any liabilities other than a negligible amount for the one year.

Evidence was produced that there had been gifts to the Appellant and his family from various sources. No attempt was made to follow leads concerning gifts or to determine the amount of the gifts.

During the investigation, agents of the Internal Revenue Service determined that there was a trust. Evidence produced established merely that the Appellant's mother was a beneficiary. Without further clarification as to the source of the corpus of the trust, the

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to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as "one of the most valuable prerogatives of the citizen." Brown v. Walker, 161 US 591, 610, 40 L ed 819, 825, 16 S Ct 644. We have reaffirmed our faith in this principle recently in Quinn v. United States, 349 US 155, 99 L ed 964, 75 S Ct 668. In Ullmann v. United States, 350 US 422, 100 L ed 511, 76 S Ct 497, decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in Ullmann, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise *[558] might *be ensnared by ambiguous circumstances. See Griswold. The Fifth Amendment Today (1955).

government included the trust assets in their net worth calculation [Exs. 123, 128; RT 277-280, 343-344].

When the Internal Revenue Agents first contacted the Appellant, during the pre-indictment investigation, they were in possession of an informer's letter concerning the Appellant which had been sent to the Internal Revenue Service. The agents were members of the field audit group commonly known as the "fraud squad" [RT 268-269]. The agents did not advise the Appellant at the initial interview or at any other point in the investigation that he had the right not to talk to them, that anything he said could be used against him, or that he had the right to assistance of counsel [RT 271-272]. At the trial, despite Appellant's objection, evidence was admitted which had been obtained from him by the agents during the pre-indictment investigation or which was derived from the information so obtained by the agents [RT 34, 41-43].

Questions Involved.

1. Did the Government sustain its burden to show that the alleged increases in the Appellant's net worth are attributable to taxable income for the years 1959 and 1961?
2. Did the Government sustain its burden to show a likely source of taxable income which could account for the alleged increases in net worth?
3. Did the Government sustain its burden to show that there was a willfull understatement of income.
4. Was it proper to have admitted evidence which had been obtained without Constitutional advice to the Appellant by Government agents when

they were, under the guise of a civil investigation, acting as a result of an informant's letter; and by reason of information gathered over a period of one and one-half years were fully aware that any evidence solicited from Appellant might tend to incriminate him.

The first three questions were raised in the Appellant's motion for judgment of acquittal made at the close of all the government's evidence [RT 354]. The motion was based in part on the ground that the government's evidence was insufficient under *Holland v. United States* (1954), 348 U.S. 121 and *United States v. Massei* (1958), 355 U.S. 595. The court denied that motion [RT 356]. The motion was renewed on the same ground at the close of all the evidence in the case [RT 365]. The renewed motion was denied [RT 366]. The questions were again raised by the Appellant's written motion for judgment of acquittal not withstanding verdict of guilty, or in the alternative for a new trial [CT 126]. That motion was also denied by the court [RT 523, 540].

The last question was first raised by a pre-trial motion under Rule 41E, "Federal Rule of Criminal Procedure", for the suppression of evidence, exclusion of statements and return of documents [CT 51; RT Vol. II, 37]. The pre-trial motion was denied by the court without permitting any introduction of evidence on the matter [RT 45]. The question was raised in connection with testimony of Special Agent Keifer into introduction of Exhibits 9 through 33 and 37 through 62 [RT 21. 24 and 25]. The objection was overruled [RT 52].

The question was again raised when the Appellant objected on the same grounds to the introduction into

evidence of Exhibits 63 through 69 and 71 through 81 [RT 56]. That objection was also overruled [RT 57].

The question was again raised by objection to testimony of Revenue Agent Akola concerning his conversation with the Appellant on June 12, 1962 [RT 266]. The court also overruled that objection [RT 272].

Specification of Errors.

1. The District Court erred in denying Appellant's motion for judgment of acquittal after the close of evidence submitted by the Appellee [RT 354-356]. The motion was made on the ground that the Appellee's evidence is insufficient to sustain a conviction of the offenses charged in the indictment [RT 355].

2. The District Court erred in denying Appellant's motion for judgment of acquittal which was renewed after the close of all the evidence in the case [RT 365-366]. The renewed motion was also made on the ground that the evidence is insufficient to sustain a conviction of the offenses charged in the indictment [RT 365].

3. The District Court erred in denying Appellant's motion for judgment of acquittal notwithstanding the verdicts of guilty, or in the alternative for a new trial [CT 126; RT 523, 540]. The motion was made on the grounds that (a) the trial court erred in denying Appellant's motion for acquittal made at the close of the Appellee's case and renewed at the close of all the evidence; (b) the verdicts are not supported by sufficient evidence; (c) the trial court erred in overruling objections to evidence which had been obtained by Appellee in violation of Appellant's constitutional rights [CT 126].

4. The District Court erred in denying Appellant's pre-trial motion for the suppression of evidence, exclusion of statements, and return of documents [CT 51; RT Vol. II, 45]. The motion was made on the grounds that the Appellant's books, records, and other documents were illegally obtained by agents of the Internal Revenue Service in violation of the Appellant's rights under the Fourth, Fifth, and Sixth Amendments to the Constitution, and that the Appellant's statements were illegally obtained by the agents in violation of the Appellant's right under the Fifth and Sixth Amendments of the Constitution [CT 51].

5. The District Court erred in denying Appellant's objection to the admission of Exhibits 9 through 33 and 37 through 62 [RT 21, 24-25, 52]. The objection was made on the grounds that the information contained in the exhibits were illegally obtained from the Appellant by agents of the Internal Revenue Service in violation of the Appellant's rights under the Fourth, Fifth and Sixth Amendments of the Constitution [RT 48].

Summary of Argument.

The Appellant urges two principal points on this appeal. The first is that the Government failed to make a *prima facie* case under the rules governing the net worth method of proof in tax evasion cases. For that reason, the Appellant was entitled to a judgment of acquittal at the close of the Government's case. The second point is that evidence was erroneously admitted which had been obtained from the Appellant in violation of his rights under the Fourth, Fifth, and Sixth Amendments to the Constitution.

The argument concerning the sufficiency of the evidence can be broken down as follows: The requirements

of proof in net worth tax evasion prosecutions require that there be evidence to support an inference that the Appellant's net worth increases are attributable to currently taxable income. The cases hold that evidence supporting that inference must at least show that there was a likely source of unreported taxable income or that all possible sources of non-taxable income have been negated. The Appellant contends that the Government has failed to show either a likely source or that there are no non-taxable sources.

When the Internal Revenue Agent first interviewed the Appellant he was in possession of an informant's letter. He did not advise him of the possible criminal nature of the investigation. Nor did he advise him that he had a right to remain silent as well as the right to the assistance of counsel. As a consequence, this evidence was inadmissible.

ARGUMENT.

The District Court Improperly Equated the Increases in Appellant's Net Worth with Taxable Income.

A. The Government Did Not Prove a Likely Source of Unreported Taxable Income.

The Supreme Court has warned that one of the pitfalls inherent in the use of the net worth method is the possibility that the bare figures will acquire an independent significance of their own apart from the evidence which gave rise to them. *Holland v. United States* (1954), 348 U.S. 121, 127-128.

The assumption that unexplained increases in net worth can be equated with unreported taxable income is unwarranted unless the safeguards set forth in the *Holland* case are scrupulously followed.

> "Increases in net worth, standing alone, cannot be assumed to be attributable to *currently taxable income*. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient." *Holland, supra,* pages 137-138. (Emphasis supplied.)

In *United States v. Massei,* (1958), 355 U.S. 595, the Court held ". . . Should all possible sources of nontaxable income be negatived, there would be no necessity for proof of a likely source." In so doing, the Court laid down a very narrow exception to the likely source rule. All *possible* sources were not negatived in this case. Therefore, the Government was required to show a likely source.

In the *Holland* case (*supra*, p. 137), the Court held that there was a likely source of unreported taxable in-

come which would support an inference that the defendant's net worth increases were attributable to *currently* taxable income because the Government's evidence tended to show that although the defendant's hotel business apparently increased during the indictment years, the reported profits fell to about 25% of the amount declared by former owners in a comparable period; that the cash register tapes, on which the books were based, were destroyed by the defendant; and that the books did not reflect the receipt of money later withdrawn from the cash register for the defendant's personal living expenses and for payments made for restaurant supplies. The Court comments: "Thus there was ample evidence that not all the income from the hotel had been included in its books and records."

The Appellant contends that the Trial Court did not properly apply the rules set forth in the *Holland* case concerning the likely source requirement. This contention is based upon the fact that the Government did not prove an undisclosed business capable of generating taxable income as it did in *United States v. Johnson* (1943), 319 U.S. 503 nor did the Government make any showing that the Appellant's disclosed business was capable of producing more income than it had reported, or that there were any irregularities in the bookkeeping, as was shown in *Holland*.

The record does not even contain the tax returns or any other record of the income of the various corporations, partnerships, and ventures in which the appellant was interested except Exhibits 68 and 69, which specify amounts to be reported for 1960 relating to Industrial Land Corporation and Ellis-Middlefield Associates [Ex. 6]. Appellant's 1960 individual tax re-

turn shows that he reported the income derived from those two entities exactly as Appellant was advised by an independent certified public accounting firm, Arthur Young and Company. Exhibit 69. Thus, the Government has offered no specific evidence to invalidate the income report by any of the various business enterprises. This indicates that it could not prove a likely source.

It is, of course, clear from the *Holland* decision that the purpose for requiring proof of a likely source is that the Court or jury must have substantial evidence to support the *inference* that the net worth increases are attributable to *currently* taxable income. The Appellant admits that the Government is not required to equate every penny of the net worth increase with an identifiable source; but, there must be some *direct evidence* to indicate that the possible source produced more income than was reported.

The Government in this case has not supported the inference connecting the net worth increases with taxable income by any evidence whatsoever except the fact that the Appellant was engaged in business. The Court apparently justifies its decision by making an *inference* that the defendant's businesses, because they did generate some income, as shown by the tax returns, might have generated more. There is nothing in the record which supports the apparent conclusion that the defendant's businesses generated more income than was reported and there is certainly nothing in the record which supports the idea that the defendant had an undisclosed business or income source.

Unlike the *Holland* case in which ". . . There was ample evidence that not all the income from the hotel had

been included in its business records, . . ." (*supra*, p. 137) the Court has made its inference of a likely source of taxable income without any support whatever. It was error as a matter of law for the Court to support the inference that the net worth increases are attributable to taxable income by spinning out a finding of likely source based on mere conjecture.

The Government contended that there were "many, many opportunities" from which Appellant could have obtained funds. The "opportunities" were nothing more than conjecture on the part of the Government counsel, and there was no evidence whatever to indicate that any action had been taken to realize the "opportunities" by failing to report taxable income from any of the businesses in which Appellant engaged.

In the *Holland* case, the Court carefully laid out the type of proof that was necessary in a net worth prosecution. These safeguards were necessary because the Court "concluded that the method involved something more than the ordinary use of the circumstantial evidence in the usual criminal case," (*Supra*, p. 124). The Court at pages 127-128 and 137 clearly indicates that there must be some substantial evidence to support the inference that the defendant's net worth increases are attributable to *currently* taxable income. It is for this reason that a finding of likely source supported by substantial evidence is required. If the mere fact that a taxpayer is engaged in business acitvities is sufficient to meet this test, then the requirement of a likely source is meaningless in almost every case involving the owner of a business.

In the recent case of *United States v. Romano* (1965), 382 U.S. 136, 15 L. Ed. 2d 210, the Court

held that it was a violation of the Due Process Clause of the Fifth Amendment for Congress to require an inference of possession, custody and control of an illegal still in violation of 26 U.S.C. §5601(a) from evidence that the defendant was at the site where the illegal still apparatus was set up and that such presence shall be deemed sufficient evidence to authorize conviction. The Court held that such a statutory inference would be struck down if there

> ". . . was no rational connection between the fact proved and the fact presumed, if the inference of one from proof of the other is arbitrary because of the lack of connection between the two in common experience. . . . [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts." P. 139, citing *Tot v. United States* (1943), 319 U.S. 463, 467-468.

This same reasoning is applicable to the inference established by the trial judge that because the defendant was in business which generated reported income, he had failed to report additional income received from his businesses. There is no rational connection between the fact proved, the existence of the businesses, and the fact presumed, the existence of unreported income. The inference attempted by the judge "is so strained as not to have a reasonable relation to the circumstances of life as we know them,".

An additional feature of the case which tends to show that the likely source inferences drawn by the Court are improper is the fact that the Government indicated sev-

eral times that it does not contend that the evidence reveals a likely source which supports the claimed connection between the net worth increase and taxable income. These indications are found in the record as follows:

(1) In the Government's trial memorandum [CT 88, 91] reference is made to the *Massei* case, (1958), 355 U.S. 595, and the rule of law that proof of a likely source is unnecessary if all possible sources of non-taxable income are negatived.

(2) On the day before the trial commenced, the trial judge, in open court, inquired of counsel for the Government concerning the theory of their case. The following colloquy took place [RT Vol. II, p. 73]:

> "The Court: I read it [*Holland v. United States, supra*] many times and I am not sure that I understand it. But if there is a likely source of income there is no problem, but when we get into the negative features—do you intend to show a likely source of income?
>
> "Mrs. Dunne: In this regard, your Honor, we are presenting essentially all the negative aspects, or proving that there were no gifts or non-taxables, non-taxable sources of income."

(3) One of the Government witnesses, Mr. Ivan Wood, testified that he is secretary-treasurer of San Diego County Farmers, Inc. [RT 156], a farm labor association [RT 167]; that he came into contact with the Appellant concerning insurance for bracero farm labor which was placed by the farmers' organization through the Appellant's insurance agency [RT 167-168]; and that apart from a loan from Appellant's mother [RT

165-166], and an advance to the Appellant in connection with a land purchase [RT 158-159], the witness had no other "personal financial dealings" with the Appellant [RT 168-169].

On cross-examination Mr. Wood testified that the farm association had 850 to 900 member farmers [RT 170], and that the insurance premiums were collected by the association office and paid over to the Appellant's companies [RT 171-172]. The witness was asked what system of checks or audits were used by the farm association regarding the funds [RT 172]. At that point the Court interrupted and asked if there was any contention that any of these funds went into the personal hands of the Appellant [RT 172]. Counsel for the Government answered "No" [RT 172].

(4) In her closing argument, Government counsel indicated that the Appellant's corporations properly recorded all their transactions [RT 395, 399 and 406].

Thus the record is not only devoid of any evidence of a specific likely source of unreported taxable income, but the Government denied that certain funds intended for the Appellant's companies went into his personal hands, and the Government's closing argument leaves the impression that there was nothing wrong with the books, records and tax returns filed by those companies.

There is a civil case which has striking similarities to the facts in the Appellant's case. In *Thomas v. Commissioner* (1st Cir. 1956), 232 F. 2d 520, 526, the Court said that the element of likely source is indispensable to proof of the net worth method, even in a civil case. The Government argued that that requirement had been met because "The taxpayer's corporation

is a possible source of taxable income which could account for the net worth increases. The Court answered this contention as follows:

> "We think this argument assumes the very fact to be proved. There must be some independent showing that the corporation might be the source of the unreported income, not merely a negative inference arising from the prior assumption that the increases were taxable and therefore must derive from the corporation since no other taxable source is apparent.
>
> "In United States v. Johnson . . . the taxpayer concealed his ownership in various enterprises which were possible sources of the unreported income. In the Holland case the business was proven to be capable of producing much more income than was reported and in an amount sufficient to account for net worth increases.
>
> "No such showing has been made in the instant case. The books of the corporation are admittedly consistent. Of course this does not prove they are honest, but in the absence of some independent evidence to the contrary, we believe that respondent has not indicated a likely source of taxable income. There can be no presumption that the books of the corporation are wrong, for any such approach would render entirely nugatory this particular safeguard against abuses of the net worth method."

In *United States v. Donovan* (D. Va. 1956), 142 F. Supp. 703 a defendant was shown to be in the business of operating a numbers racket, but he kept a complete set of books and records which the Government

could not prove were incorrect. No other possible source was shown. The Government claimed a presumption of falseness because of the nature of the business. The District Court reviewed the decision in the *Thomas* case and stated that the fact that the likely source requirement was strictly applied despite the different burden of proof in a civil case makes the First Circuit interpretation particularly significant. The Court entered a judgment of acquittal notwithstanding the jury's verdict of guilty.

In another net worth case, *United States v. Adonis* (3rd Cir. 1955), 221 F. 2d 717, the court held that evidence offered by the prosecution that the defendant, a government employee, performed services in 1950 for pinball machine operators, was insufficient to show a likely source of taxable income for 1948, the indictment year. Similar evidence for pre-indictment years was held insufficient to show a likely source by the First Circuit in *United States v. Massei, supra.*

B. The Government Did Not Negative Possible Non-Taxable Sources.

The government failed to negative all possible sources of non-taxable income. That defect in the proof, together with the failure to prove a likely source, means that there was no evidence from which it can be inferred that the net worth increases are attributable to *currently* taxable income. Thus, the government did not make the *prima facie* showing required by the *Holland* case and the Appellant was entitled to a judgment of acquittal at the close of the government's case, pursuant to his motion under Rule 29 [RT 354-356].

The issue here is did the Government negative all possible sources of non-taxable income.

There are published opinions[3] which hold that where the defendant offers evidence of non-taxable sources and such sources are later disproved, that the Government is not required to negative all other possible sources.

The record does not show that the Appellant offered any evidence of non-taxable sources. Hence, this line of cases is not applicable to the present case.

Another acceptable method of negativing possible non-taxable sources of income is for the Government to make a showing of the extensive nature of their investigation in an attempt to uncover possible non-taxable sources of income. In the case of *United States v. Adonis* (3rd Cir. 1955), 221 F. 2d 717 there was no likely source of taxable income, but the Court at page 718 observed as follows:

> "* * * The Government proved diligent search for loans, inheritances, gifts and any other potential sources of nontaxable receipts in 1948 which might have supplied the large sums expended by appellant on his home building project. In this connection, although appellant elected to stay away from the investigators who sought to interrogate him about his 1948 income, the investigation covered all appellant had said or was reported to have said from time to time to other people in explana-

[3] *United States v. Helovachka*, 7th Cir. (1963), 314 F. 2d 345; *Gatling v. Commissioner* (4th Cir. 1961), 286 F. 2d 139; *Commissioner v. Thomas* (1st Cir. 1958), 261 F. 2d 643; *Ferris v. Commissioner* (2nd Cir. 1963), 317 F. 2d 333; *Ehlers v. Vinal* (D. Nebr. March 29, 1966), F. Supp. ..... 66-1 USTC Para. 9339.

> tion of his ability to finance a very expensive 1948 project, so out of line with his apparent circumstances. *This line of evidence was such as to warrant a conclusion by a jury that all reasonable inquiry had been made without discovery of any credible evidence of substantial nontaxable receipts during 1948.*" (Emphasis added).

Also see *United States v. Ford* (2nd Cir., 1956), 237 F. 2d 57, at 59 follows *Adonis.*

At no place in the record can there be found any evidence comparable to that in the *Adonis* and *Ford* cases *supra,* to show the extent of the Government's investigation. The Government's evidence concerning liabilities shows nothing more than the assertion that the minimum amount was $80.56 [RT 106]. The Court indicated that the amount seemed quite small and that the form of the stipulation did not preclude the showing of additional liabilities [RT 106-107]. The Government at no point introduced any evidence that $80.56 was the maximum amount of the appellant's liabilities during the indictment years.

Exhibit 128 shows that at the end of the indictment year, the Appellant had a net worth of over half a million dollars and that he was engaged in numerous businesses. It is almost inconceivable that he should have such a negligible amount of liabilities. The possibility that the Appellant had additional liabilities surely must have been apparent to the Revenue Agents during the pre-indictment investigation. The agents were under a duty to follow this "lead". *Merritt v. United States* (5 Cir. 1964), 327 F. 2d 820.

In view of the *Massei* case there should have been an investigation to determine whether there were any

more liabilities. There is nothing in the record to show that the Government agents made any check of the books or brokerage houses where they knew the defendant did business to see if there were any loans which could account for the alleged increase in net worth [RT 275]. Nothing in the record shows that any inquiry was made of other banks, brokerage houses or lending institutions in the community where the defendant resided or was known to have done business to ascertain whether loans could account for the alleged increase in net worth [RT 179, 180, 239, 262]. It is submitted that loans were a possible or even probable source of non-taxable income which have not been negatived by the Government.

The proof concerning the possibility of gifts as a source of non-taxable income was also insufficient. Kirk Mallory, a Government witness, testified that there had been gifts to the appellant's wife from her mother [RT 199, 215]. On cross-examination, Mallory testified that Mrs. Feichtmeir received a gift from another relative [RT 203]. The government introduced no evidence of the total amount of these gifts.

The government did attempt to negative non-taxable sources by asking certain witnesses whether they had made gifts or loans to the Appellant. However, there was no consistency in selecting which witnesses which were to be asked such questions and which were not.

In addition, Helmer S. Akola, a Revenue Agent, testified that during the investigation he was aware of a trust created in 1959, that he examined the tax return for the trust, but he did not attempt to determine if any of the trust assets were included in his computation of defendant's assets [RT 261, 262, 277, 279]. He

also testified that it is possible that trust assets are included in Exhibit 123 which support the net worth statement [RT 280-281]. The trust was certainly a "lead" which was apparent to the agents which should have been followed to negative any non-taxable receipts which could have come from the trust to the defendant.

The issue of what must be the quality of proof for the government to establish a *prima facie* case that "all possible sources" of non-taxable income have been negatived is, in reality, academic in this case. At the very least, the government, in its case in chief, must introduce evidence that they have fully investigated and tracked down all the sources of non-taxable income which appear to be probable from the business and financial history of the particular taxpayer. There is a very strong probability that the Appellant had more loans than the minimum amount stipulated. Anyone, such as a revenue agent, with experience in accounting would realize that liabilities in this case should be thoroughly investigated before an accurate net worth statement could be introduced. Yet, there was no investigation shown. The government showed some evidence negativing gifts and loans from some business associates, but not others and the Mallory testimony leaves the impression that there may have been additional gifts from the Bennetts. And finally, the 1959 trust was known to the government, but it was never investigated.

There was clearly insufficient evidence of likely source and of the lack of non-taxable sources to support the inference required by the Supreme Court in *Holland* and related cases that the net worth increases are attributable to *currently taxable income*. The Appellant was entitled to a judgment of acquittal pursuant to his

motion after the close of the government's evidence because the government had not made a *prima facie* case. For the same reason there should have been a judgment of acquittal at the close of all the evidence and after the verdict of guilty.

The District Court Erroneously Admitted Evidence Which Had Been Obtained From the Appellant in Violation of His Rights Under the Fourth, Fifth and Sixth Amendments.

In January 1962, during the pre-indictment investigation when the Appellant was first interviewed by an agent of the Internal Revenue Service, the agent was in possession of an informant's letter concerning the tax affairs of the Appellant. [RT 268]. The agent, Helmer S. Akola and his predecessor in the investigation were assigned to Field Audit Group 7, commonly known as the "fraud squad" [RT 269-270]. The agent did not advise the Appellant of his constitutional right not to talk to the agent or to have the assistance of counsel [RT 271]. It is reasonable to assume that when Revenue Agent Akola first approached the taxpayer, he was aware of the fact that he was likely to obtain incriminating information from the Appellant during the ensuing conversations and the inspection of the Appellant's books and records.

Agent Akola at this stage of the investigation was acting under the color of authority of Section 7602, Internal Revenue Code of 1954, the text of which is set out in full in the appendix. The language of this section which grants authority to compel the production of records and to take testimony of a taxpayer,

> "is directed solely to the determination and collection of the civil tax liability. Nothing in the statute

> specifically authorizes use of the summons in a criminal investigation, and the Code does not contain any general investigative authority from which the necessary authorization could be implied".

Lipton, "Constitutional Safeguards and Corporate Records," N.Y.U. Twenty-Third Annual Institute on Federal Taxation, 1315, 1317 (1965).

The Supreme Court has recently indicated that Section 7602 may not be used for the purpose of obtaining evidence for use in a criminal prosecution. *Reisman v. Caplin* (1964), 375 U.S. 440, 449.

Under these circumstances when the agent obtained information and documents from the Appellant without advising him of his rights under the Fourth, Fifth and Sixth Amendments to the Constitution, he was entitled to have all such evidence suppressed from use at the trial, including that evidence which had been derived from the evidence so obtained and not independently from other sources. *Escobedo v. Illinois* (1964), 378 U.S. 478; *Nardone v. United States* (1939), 308 U.S. 338; *Wong Sun v. United States* (1963), 371 U.S. 471.

Within the meaning of the Fifth Amedment, appellant was compelled to incriminate himself during the agent's investigation because Section 7602 appeared to force him to cooperate. He was not advised of the fact that the agent was a member of the "fraud squad," that he had information which might incriminate the Appellant and that the additional information to be sought by the agent from his conversations with the Appellant and from the Appellant's books and records could be used against him in any criminal proceeding. Thus, because of Section 7602, the Appellant's freedom of action

was restricted in a most significant way. He was, in effect, waiving his rights under the Fourth, Fifth and Sixth Amendments without being aware of the fact that he was in a situation which might call for his exercise of those rights. There was certainly no knowing or intelligent waiver of his rights. *Johnson v. Zerbst* (1938), 304 U.S. 458, 464.

Although the *Escobedo* case, *supra,* concerned an accused person who had been arrested and confined and who had requested the advice of an attorney, the Appellant contends that it is applicable to his situation as outlined above, because, at least for purposes of the Fifth Amendment, the requirement under Section 7602 that he answer all inquiries of the Internal Revenue Agent, is every bit as compulsive as the fact of the arrest in *Escobedo.* The Appellant's freedom to choose whether or not to talk to the agents was extremely limited because he could not have been aware of the possible criminal nature of the investigation and the inapplicability of Section 7602, unless he had at the very minimum been advised of the informant's letter. There were none of the usual trappings of a criminal prosecution. The investigation appeared to be nothing more than a routine tax audit. There was nothing in the character of the investigation to indicate that it could involve criminal penalties.

It is immaterial that he did not request an attorney. Certainly, unless he was advised of his constitutional rights there would be no reason for him to suspect that he needed an attorney, because it did not appear to be anything but a routine tax audit. Furthermore, the Supreme Court has clearly held that a right to counsel does not depend on a request for counsel and the waiver

of a right to counsel will not be presumed from a silent record. *Carnley v. Cochran* (1962), 369 U.S. 506.

The Appellant is aware of the opinion of this Court in *Kohatsu v. United States* (9 Cir. 1966), 351 F. 2d 898, cert. den. (June 20, 1966). However, the existence of the informer in the Appellant's case clearly distinguishes it from *Kohatsu*. The Agents were quite aware from the beginning that they were likely to obtain incriminating information from the Appellant.

The District Court erroneously applied the standards of the *Escobedo* and *Carnley* cases when it denied the Appellant's written pre-trial motion, and again when he overruled the Appellant's objection to the introduction of evidence which appeared to have been derived from such evidence. The District Court again overruled a similar objection to the testimony of Revenue Agent Akola concerning his conversation with the Appellant on June 12, 1962.

The Government Did Not Make a Prima Facie Case on the Issue of Willfulness.

One of the required elements of the crime charged in the indictment is willfulness. In this context that term means bad purpose and evil motive and an act done with the specific intent to accomplish that which the law forbids. *United States v. Murdock* (1933), 290 U.S. 389, 394-395.

The Appellant contends that the record is not sufficient to show that he had either bad purpose, evil mo-

tive, or any specific intent to violate the Internal Revenue Laws.

If there was not sufficient evidence that Appellant's net worth increases can be attributed to taxable income, the Appellant was entitled to an acquittal on that ground alone and there is no necessity to find willfulness in a record which doesn't show there was any unreported taxable income.

Conclusion.

This Court should reverse the Appellant's verdict of guilty on Counts Two and Four of the indictment and remand the case with instructions to acquit the Appellant on both counts. This Court may, in its discretion, reverse the judgment of the District Court and order an acquittal.[4]

In this case, Appellant contends that it is abundantly clear that the government's proof was substantially lacking in the evidence required to make a *prima facie* case. Under the circumstances, the Appellant was entitled to a judgment of acquittal at the time he made his motion under Rule 29 at the close of all the evidence in the government's case. This brief has shown that there is a great deficiency in the government's proof relating to likely sources of unreported taxable income and the non-taxable sources. It is highly im-

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[4]*See* 28 U.S.C. Section 2106, 62 Stat. 963; compare *Bryan v. United States* (1950), 338 U.S. 552 with *Sapir v. United States* (1955), 348 U.S. 373; *Forman v. United States* (1960), 361 U.S. 416.

probable that these matters were overlooked by Government counsel. The Government's trial memorandum and the colloquy which occurred between the Court and Government counsel, on the day prior to trial, show that the Government was well aware of these required elements of its case. A direction of acquittal under similar circumstances was made in *Karn v. United States* (9th Cir. 1946), 158 F. 2d 568; *United States v. Bozza,* (3rd Cir. 1946), 155 F. 2d 592; *United States v. Renee Ice Cream Co.,* (3rd Cir. 1947), 160 F. 2d 353 and *United States v. Gardner* (7th Cir. 1948), 171 F. 2d 753.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

ALVA C. BAIRD

APPENDIX A.

Statutes and Constitutional Provisions.

United States Constitution
Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code of 1954
26 U. S. C. A. (1955 *ed.*)

§7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000,

or imprisoned not more than 5 years, or both, together with the costs of prosecution.

§7602. *Examination of books and witnesses*

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary, or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

APPENDIX B.

Statutes and Constitutional Provisions.

United States Constitution
Amendment VI
Jury Trial for Crimes, and
Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

TABLE OF EXHIBITS